TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~461.~~ 177

THE UNITED STATES, APPELLANTS,

vs.

DOMINICK O'GRADY'S EXECUTORS.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 5, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 461.

THE UNITED STATES, APPELLANTS,

vs.

DOMINICK O'GRADY'S EXECUTORS.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

DOMINICK O'GRADY'S EXECUTORS
vs.
THE UNITED STATES. } No. 6825. Filed Nov. 13, 1872.

To the United States Court of Claims:

The petition of John Quinlan, C—— Cavaroe, Michael J. Brenan, and Joseph T. Mayburey, executors of the last will and testament of Domonic O'Grady, of the city of Mobile and State of Alabama, respectfully show to your honors:

That, whereas the aforesaid executors, by the consideration of the honorable the United States Court of Claims, recovered a judgment against the United States for the sum of seventy-two thousand four and fifty dollars, being for the proceeds of four hundred and fourteen bales of cotton, at $175 per bale, which judgment was rendered on the first day of April, 1872, as will more fully appear by the record thereof in this court now remaining, which judgment is in full force, not annulled or appealed from, and remains unsatisfied in part, to wit, for the sum of four thousand one hundred eighty-one dollars and $\frac{40}{100}$.

That your petitioners, after the expiration of ninety days from the day of the rendition of said judgment, procured a duly-certified transcript of said judgment from the clerk's office of said court, and presented it to the Secretary of the Treasury, and requested payment of the same agreeable to the terms thereof.

That the Secretary of the Treasury paid your petitioners the sum of sixty-eight thousand two hundred and sixty-eight dollars and sixty cents, and refused to pay any more on said judgment, and claimed
2 to retain the sum of four thousand one hundred eighty-one dollars and forty cents out of said judgment, as the cotton-tax of two cents per pound, due from the claimants to the United States, and refused to pay any sum, unless your petitioners would consent, under written stipulations, to receive the same without prejudice to their rights, and subject to the future decision of the Supreme Court. That your petitioners demanded the full amount of this judgment, and protested against receiving a less sum in satisfaction thereof, to their hurt or injury, or in bar to their claim, which was conceded to them.

Inasmuch as your petitioners are remediless in any other way, they pray judgment in this court for the balance justly due them in said judgment, to wit: four thousand one hundred eighty-one dollars and sixty-cents.

Your petitioners further allege that they are citizens of the United States; that they are the sole owners of said claim; that no assignment of the whole or any part of said claim has been made; that they have atall times borne true allegiance to the Government of the United States; and that they have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

T. J. D. FULLER,
Attorney for Claimants.

T. J. D. FULLER, *Solicitor*,
P. O. address, Washington, D. C.

DISTRICT OF COLUMBIA,
Washington City:

On this 13th day of November, 1872, personally came T. J. D. Fuller,

the person who signed the foregoing petition, and made oath, according to his best knowledge, information, and belief, the facts stated in said petition are true; that no assignment or transfer of said claim has been made, or any part or interest therein; that the sum claimed is justly due to the claimants, after allowing all just set-offs.

[L. S.] JA'S H. McKENNEY,
Notary Public, District of Columbia.

3 In the United States Court of Claims. December term, A. D. 1872.

D. O'GRADY'S EXECUTORS
vs.
THE UNITED STATES. } No. 6825.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of four thousand one hundred and eighty-one dollars and sixty cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

W'M McMICHAEL,
Assistant Attorney-General.

4 In the Court of Claims.

JOHN QUINLAN, C. CAVAROC, MICHAEL J. Brenan, and Joseph T. Mayburey, executors of Dominick O'Grady, dec'd,
vs.
THE UNITED STATES. } 6825.

At a Court of Claims, held at the Capitol, in the city of Washington, the second day of June, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said John Quinlan, C. Cavaroc, Michael J. Brenan, and Joseph T. Mayburey, executors of Dominick O'Grady, dec'd, have and recover of and from the United States the sum of four thousand one hundred and eighty-one dollars and forty cents, ($4,181.40.)

By the court.

5 In the Court of Claims of the United States. December term, 1872.

DOMINICK O'GRADY'S EXECUTORS
vs.
THE UNITED STATES. } 6825.

Now comes the defendants, by their Attorney-General, and take an

appeal to the Supreme Court of the United States from the judgment of the Court of Claims in this case, rendered on the second day of June, 1873.

JOHN GOFORTH,
Ass't Attorney-General.

WASHINGTON, D. C., *June* 17, 1873.

Allowed July 3, 1873.

C. D. DRAKE, *C. J.*

Filed in clerk's office June 19, 1873.

6 United States Court of Claims.

DOMINICK O'GRADY'S EXECUTORS
vs.
THE UNITED STATES.

In this case the court finds the facts to be as agreed upon between the parties, through their respective counsel, as the case upon which the decision of the court is to be rendered, as follows:

The claimants, on the 1st day of April, A. D. 1872, by the consideration of the Court of Claims, recovered a judgment against the United States, under what is called "the captured and abandoned property act" of March 12, 1863, for the sum of $72,450, being the net proceeds of four hundred and fourteen bales of cotton captured at Mobile, in April, 1865, at the rate of $175 per bale. A transcript of said judgment was taken from the office of the clerk of this court, by the attorney of the claimants, T. J. D. Fuller, and filed in the office of the Secretary of the Treasury on the 15th day of April, 1872, and payment of said judgment was demanded. Said transcript was in the words and figures following:

"In the Court of Claims.

"JOHN QUINLIN, C. CAVAROC, MICHAEL J. Brenan, and Joseph T. Maybury, executors of Dominick O'Grady,
vs.
"THE UNITED STATES. } 3159.

"T. J. D. Fuller, esq., att'y of record.

"At a Court of Claims, held at the Capitol, in the city of Washington, first day of April, A. D. 1872, judgment was ordered to be entered up as follows:

"The court, upon due consideration of the premises, find in favor of the claimants, and do order, adjudge, and decree that the said John Quinlin, C. Cavoric, Michael J. Brenan, and Joseph T. Maybury, executors of Dominick O'Grady, have and recover of and from the United States the sum of seventy-two thousand four hundred and fifty dollars, ($72,450,) being the net proceeds of four hundred and fourteen bales of cotton, at the rate of one hundred and seventy-five dollars per bale.

"By the court.

"A true copy of record.

"In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 15th day of April, A. D. 1872.

"JOHN RANDOLPH,
"*Ass't Clerk Court of Claims.*

"Attest:
"C. D. DRAKE, *C. J.*
"JUNE 29, 1872. Not appealed.

"JOHN RANDOLPH,
"*Ass't Clk C. C.*"

7 Afterward, on the 1st day of July, A. D. 1872, more than ninety days having elapsed after the time of rendition of the aforesaid judgment, payment thereof was again demanded at the Treasury of the Secretary, and the Secretary of the Treasury thereupon made the following indorsement upon the transcript of said judgment:

"TREASURY DEPARTMENT,
"*Secretary's Office, July* 1, 1872.

"An examination of the accounts having been made, the net proceeds of the cotton referred to in the record and proceedings of the Court of Claims in the case of John Quinlan et al., executors of Dominick O'Grady, appear to be, as nearly as can be ascertained, the sum of sixty-eight thousand two hundred and sixty-eight dollars and sixty cents, ($68,268.60,) after the deduction of two cents per pound internal-revenue tax. And the claim is hereby referred to the First Auditor, who will report the same to the First Comptroller, as payable out of the proceeds of captured and abandoned property, reserved and set apart for that purpose by the act of March 12, 1863.

"GEO. S. BOUTWELL,
"*Secretary of the Treasury.*

"FIRST AUDITOR'S OFFICE, *July* 1, 1872.

"COMPTROLLER'S OFFICE, *July* 1, 1872.

"JAMES AULD."

The said Secretary refused to pay any part of said judgment unless the attorney of the claimants would consent to and sign a written stipulation of the tenor and effect following:

"In the Court of Claims.

"DOMINICK O'GRADY'S EXECUTORS
vs.
"THE UNITED STATES. } No. 3159.

"The defendants claim the deduction of $4,181.40 as the internal-revenue tax of two cents per pound on the cotton for which judgment was given in the above-named cause, on the 1st of April, 1872.

"And it is hereby stipulated and agreed by the counsel representing the above claimant, that the said deduction may now be made, and that all the rights of the several parties in respect to the aforesaid tax are reserved, and remain subject to the decision of the Supreme Court without prejudice.

"T. J. D. FULLER, *Attorney.*

"JULY 1, 1872."

Thereupon the claimant's attorney signed the said stipulation, when the sum of $68,268.60 was paid to the claimants, leaving said judgment unsatisfied in part, to wit: for the sum of $4,181.40 reserved and detained as the internal-revenue tax on cotton, and which the Secretary refused to pay to the claimants.

The claimants brought their action of debt against the United States on said judgment to recover this sum.

On the foregoing facts, the conclusion of law is that the claimants are entitled to have and recover from the United States the sum of $4,181.40.

8 Per curiam:

This suit is brought to recover the sum of $4,181.40, withheld by the Treasury Department in paying a judgment rendered by this court in favor of the claimants for the proceeds of a quantity of cotton captured by the military forces of the United States, at Mobile, in 1865.

This court has uniformly, whenever the question has been raised, refused to deduct the internal-revenue tax of two cents per pound from the proceeds of cotton sued for; but this is the first opportunity presented for rendering a judgment for an amount withheld. As the case is expressly prepared to test the question before the appellate court, we need not enter upon a discussion of the matter involved, particularly as the further deduction of the tax in cases of this description is forbidden by section 6 of the act of June 10, 1872, (17 Stat. L., 347, 369.)

We therefore content ourselves with simply putting the matter in a shape to be finally decided elsewhere, by ordering a judgment to be entered in favor of the claimants for the amount demanded.

9 In the Court of Claims.

JOHN QUINLAN, C. CAVAROC, MICHAEL J. Brenan, and Joseph T. Mayburey, executors of Dominick O'Grady,
vs.
THE UNITED STATES. } No. 6825.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the defendant, by his Attorney-General, for the allowance of an appeal, as filed in the clerk's office June 19th, 1873, and of the order of the chief justice of said court allowing the same; of the finding of facts and the conclusion of law thereupon, upon which the court founded its judgment, and the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixth day of August, A. D. 1873.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 461. The United States, appellants, vs. Dominick O'Grady's Executors. Court of Claims. Filed 5th August, 1873.

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In the Supreme Court of the United States.

OCTOBER TERM, 1874.

UNITED STATES
vs.
JOHN QUINLAN & OTHERS, EXECUTORS of Dominick O'Grady. } No. 177.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.



In the Supreme Court of the United States.

OCTOBER TERM, 1874.

UNITED STATES
vs.
JOHN QUINLAN & OTHERS, EXECUTORS of Dominick O'Grady. } No. 177.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

The claimants recovered a judgment in the Court of Claims for $72,450, the proceeds of the sale of 414 bales of cotton captured by the military authorities at Mobile, in 1865, under the captured and abandoned property act. The Secretary of the Treasury deducted therefrom the amount of the internal-revenue tax imposed on cotton by the act of March 7, 1864, §§ 4 *et seq.* (13 Stats. at Large, 15, 16,) amounting to $4,181.40, and paid the remainder. (Rec., pp. 4, 5.) The claimants sued to recover the amount thus withheld. The Court of Claims gave judgment in their favor, (Rec., p. 5,) and the Government appeals.

ASSIGNMENT OF ERROR.

The cotton was liable to this tax, and the Secretary rightly withheld the amount of it.

ARGUMENT.

The act in force at the time of the capture of this cotton imposed a tax of two cents a pound upon all cotton produced or sold and removed for consumption, and upon which no duty has been levied, paid, and collected, and the tax was made a lien upon the cotton, until paid, in the possession of any person whomsoever. (13 Stats. at Large, 16.) By the act of June 30, 1864, section 177, (Ibid., 305,) it is enacted that "whenever any cotton, the product of the United States, shall arrive at any port of the United States, from any State in insurrection against the Government, the assessor or assistant assessor shall immediately assess the taxes due thereon," &c., "unless evidence of previous payment of such tax shall be produced, under such regulations as the Commissioner of Internal Revenue, by direction of the Secretary of the Treasury, shall from time to time prescribe, * * * * *Provided*, that all cotton sold by or on account of the Government of the United States, shall be free and exempt from duty at the time of and after the sale thereof."

These statutes clearly show that the cotton in question was liable to the cotton-tax. The only question that seems to have been involved below was, whether the Secretary of the Treasury could deduct the amount of the tax from a judgment against the United States. And there would seem to be no reason why he could not.

The third section of the captured and abandoned property act (12 Stats. at Large, 820) provides that the owner of such property shall be entitled to receive the residue of the proceeds thereof, "after the deduction of any purchase-money which may have been paid, togeth-

er with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

It has been decided that the Government held this property as trustee for the owners. (United States *v.* Klein, 14 Wallace, 128.) This being so, it is but a reasonable construction of the language of the above statute to hold that the payment of an excise tax due upon the property, and made a lien thereon, was a lawful expense attending the trust, which the Secretary was justified in deducting. The deduction of the tax may be assumed to be made at the time of the payment of the proceeds of the sale of the cotton into the Treasury, and as the statute makes the amount due certain, no technical assessment of the tax was necessary. (Dollar Savings-Bank *v.* United States, 19 Wallace, 246.)

Besides, it is not to be presumed that the statute intended that the owner should be paid the amount of the proceeds of the cotton and the Government lose its lien for the tax. The sale of the cotton by the Government would entirely destroy the lien unless one subsisted on the proceeds in the Treasury; and construing the act imposing the tax and the captured and abandoned property act together, full effect can be given to both by holding that the lien for the tax remains upon the proceeds in the Treasury, and the tax is to be deducted before payment thereof to the owner.

C. H. HILL,
Assistant Attorney-General.

Supreme Court United States.

UNITED STATES.
v.
DOMINICK O'GRADY'S Ex'ors. } No. 177.

Brief of P. PHILLIPS and T. J. FULLER.

Under the captured and abandoned property act, O'Grady recovered in the Court of Claims a judgment for $72,450. The Secretary of the Treasury refused to pay the same without the deduction of $4,181.40, claimed as the amount of the cotton tax. This deduction was submitted to under protest, and a stipulation was entered into "that the rights of the several parties in respect to this tax are reserved, and remain subject to the decision of the Supreme Court." p. 4.

To bring the question to this court under this stipulation, the present petition was filed, claiming judgment for $4,181.40; to which the government put in the plea "that the government is not indebted to the claimant in the said sum of money, or any part thereof." p. 2.

Judgment was rendered by the court in favor of the claimant, and the government now brings its appeal therefrom.

The sole question, then, is, was the Secretary justified

in withholding the amount for the reason stated by him, to wit: the indebtedness of the claimant to the government for the tax of two cents per pound on cotton?

We do not propose to raise the question as to the constitutionality of the cotton tax. This we have heretofore argued in the case of Farrington, in which the judgment of the court below was affirmed by a divided court.

We forbear to do this, because confident that the judgment in this case can be fully sustained without involving the consideration of so grave a question.

By the 3d section of the act of 3d March, 1863, 12 Stat., 575, it is provided "that, in addition to the jurisdiction now conferred by law, the court shall also have jurisdiction of all set offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government, against any person making claim against the government in said court; and upon the trial it shall hear and determine such claim and demand, both for and against the government and claimant; and if upon the whole case it finds the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for."

The institution of the Court of Claims was to remove the anomaly of permitting a party to contracts, express or implied, from an arbitrary decision in his own cause.

Claims against the government were therefore submitted to judicial determination, of functionaries whose tenure of office under the Constitution was regarded as a guarantee of independence. Thenceforward claimants under contracts, express or implied, had a standing in court to enforce them. But under the organizing act the

court only had jurisdiction when an individual was plaintiff and the United States were defendants.

There thus remained in the hands of executive agents the assertion of claims in favor of the government. Ordinarily these could only be enforced by suits in the courts of the United States. But it often occured that when a party had a liquidated, admitted claim against the government, he was met on demand of its payment by the assertion of a claim due by the party to the government, and on a settlement of these conflicting rights, the claimant had to submit to such decision as the government agent might make of it.

This presented an evil which the institution of the court was intended to remedy, and it is submitted, that, in order fully to rectify it, the amendatory act of 1863 was passed.

If this view of the legislation is the correct one; that it was the object of Congress to give to parties dealing with the government the same protection of the judiciary as was offered to dealings between individuals, it follows that any counter claim which the government had against O'Grady should have been presented before the court was called to adjudge the original claim, and thus enable the claimant to contest its validity or justice and have judicial action upon the same. We submit that it is a violation of the spirit as well as the letter of the law, for the Secretary to withhold his counter claim,—the character of which was fully known to him,—to permit a judgment to be rendered in favor of the claimant, the finality of which is declared by statute, and then to refuse payment thereof, without the party should allow a deduction for an asserted claim on the part of the goverment, the amount and validity of which should be determined by his own judgment.

If then the government had any right to the tax, it was bound to assert that right in the course of the litigation, and having failed to do so, has thereby forfeited it.

But did O'Grady owe to the government the tax demanded?

The dominion which a citizen exercises over his property is absolute, saving only that he must so use it as to work no injury to others, and subject to the eminent domain of the government, which may expropriate it for public necessity on just compensation.

To secure him in the peaceable exercise of this dominion, is one of the chief ends for the institution of government, and to defray the expenses of maintaining it, taxes are levied on the citizens.

The right of the owner to sell his property when and where he pleases, and for what price, are the fundamental elements in the value of property. His protection in so doing is the just equivalent of the tax that is paid by him.

Tested by these principles, how is it that a claim can be asserted that O'Grady is indebted to the Government for the tax on his cotton?

Was he permitted to exercise, any dominion over it—was he consulted, as to time or place, or price of sale?

On the contrary, the government seized his cotton, deprived him of all possessary right, shipped it to its own agents, sold it on its terms, and having deducted all expenses on it, which were enormous, provides by act that the owner shall be restored to the "nett proceeds in the Treasury;" when these "nett proceeds" are demanded, the government then demands the tax, though

the owner had been deprived of all the rights of dominion attached to its ownership.

It will be seen from the record, that the original judgment was rendered on 1 April, 1872, and presented for payment on the 1 July, thereafter—as judgments of this court are not payable until the expiration of ninety days—during which the right of appeal exists.

Now, on the 10 June, 1872, Congress enacted that, "in the settlement of judgments by the Court of Claims or the Supreme Court of the United States *hereafter*, to be rendered for captured or abandoned cotton, or in settlement for cotton seized subsequent to the 30 June, 1865, the Secretary is directed to pay such judgments, or the amounts, as ascertained upon such settlements in full, without deduction on account of the internal revenue tax on cotton. 17 Stat., 369.

This is an express declaration of the law—making power, that such deduction was unjustifiable.

It is true that the act refers to judgments "hereafter to be rendered," and this was rendered as already stated, a few weeks previous. It does not fall, therefore, within the strict letter of the statute, but it does clearly fall within its intent and meaning.

Congress intended to deal with all cases which could then be controlled by it. No reason can be assigned why a different rule should be applied to a judgment on the 1 April, which was not paid, and not payable at the passage of the act, and a judgment rendered subsequent thereto.

At any rate we have the opinion of Congress, that these taxes ought not to be demanded.

P. PHILLIPS,
T. J. FULLER,
For Defendant in Error.